

9 Official Opinions of the Compliance Board 1 (2013)

- ◆ **Administrative Function** – *Outside Exclusion*, discussion of:
 - ◇ matters falling within advisory and quasi-legislative functions
- ◆ **Advisory Function** – formulation of recommendations under delegation by parent public body
- ◆ **Closed Session Procedures** – *Written Statement* – Practices permitted
 - ◇ use of pre-prepared statement if adopted when the public body votes to close
- ◆ **Minutes** – *Procedures* – Practices in violation
 - ◇ failure to adopt without undue delay
- ◆ **Notice Requirements** – *Content* – Notice requirement
 - ◇ not met by notice of “executive” session
- ◆ **Open Session Requirement** – *Generally*
 - ◇ meeting about “budgetary concerns” to be open unless Act expressly provides otherwise
- ◆ **Quasi-Legislative Function** – *Within the function*:
 - ◇ the process as well as the act of approving, disapproving or amending a budget

*Topic headings correspond to those in the Opinions Index (2010 edition) at <http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

July 9, 2013

Re: University System of Maryland Board of Regents
(*Craig O'Donnell, Complainant*)

The Open Meetings Compliance Board has consolidated and considered two complaints of Craig O'Donnell (“Complainant”) that the University System of Maryland Board of Regents (“the USM Board”) and its standing committees have consistently operated in violation of the Open Meetings Act (“the Act”).

Introduction

Complainant alleges that in 2012 the USM Board and its standing committees failed to properly notice their meetings, provided inadequate closing statements, discussed matters in closed session that should have been open to the public, and failed both to keep proper minutes of the closed meetings and to provide an adequate public summary of the closed sessions. The complainant also asserts that two standing committees, the Committee on Organization and Compensation (“Organization Committee”) and the Committee on Audit and Institutional Assessment (“Audit Committee”), improperly conducted public business exclusively through “executive sessions,” without following any of the Act’s requirements. In all, the two complaints refer to 43 meetings and 32 closed meetings.

The USM Board submitted a response in which it explains how it intends to change some practices, argues that two committees are for the most part “exempt from the Act” by virtue of the functions they perform, and addresses the allegations on a generalized basis.¹ In the meantime, we have issued our conclusions regarding Complainant’s other, more discrete, complaints about the USM Board and various standing committees. *See* 8 *OMCB Opinions* 138 (2013), 8 *OMCB Opinions* 166 (2013), 8 *OMCB Opinions* 180 (2013).²

¹ The USM Board states that Complainant’s “myriad ‘detours’ and apparently randomly organized criticisms make specific responses sometimes difficult or impossible.” We are not persuaded. Complainant identified the dates of the meetings in question and the provisions of the Act he deemed to have been violated, and the documents to which he referred established a reasonable basis for his allegation that these standing committees met on those dates to transact public business subject to the Act without complying with the Act. That the complaint, in the USM Board’s view, “suffers organizationally” is beside the point. We encourage public bodies to address the allegations they understand and, otherwise, identify with specificity those that they do not.

For example, Complainant alleged that the Intercollegiate Athletics Working Group violated the Act by meeting without giving notice. The USM Board disputes Complainant’s “implied conclusion that this working group is subject to the Act” but provides no information on how the “working group” was created. If the group was created by a USM Board resolution or bylaw, for example, it is a public body.

² Although Complainant filed these complaints first, we were able to resolve the later ones earlier because they involved far fewer entities, meetings, and alleged violations.

Here, we will avoid repeating the guidance given in those opinions and concentrate on areas that we have not already addressed. We will state our conclusions in the discussion. We will address the allegations by example in the expectation that the USM Board will use this opinion as guidance for its future meetings and not as a mere tally of past violations. Particularly, we will urge the USM Board to re-evaluate its practice of closing meetings under the provision of the Act that excludes from the Act a public body's performance of the "administrative function."

Background

A. The Board of Regents and its Standing Committees

The Board of Regents is required by its bylaws to hold at least six regular meetings each year. Bylaws of the Board of Regents of the University System of Maryland, Article VII, §1. The regents also meet in committees. The USM Board's bylaws establish six "Standing Committees": the Audit Committee, the Committee on Education Policy and Student Life, the Committee on Finance, the Committee of the Whole, the Organization Committee, and the Committee on Advancement. *Id.*, Article IX, §1. The number of regents serving on each Committee varies, but all meetings of the Standing Committees "shall be conducted in accordance with the State Open Meetings Act. . . ." *Id.*, §11D. The bylaws also provide for a Committee on Economic Development and Technology Commercialization ("Development Committee"). The committees meet the definition of a "public body" under the Act, *see* State Government Article ("SG") § 10-502(h)(ii)(5), and, like the USM Board itself, are subject to it.

The duties that the USM Board's bylaws assign to the Audit Committee include "render[ing] advice and assistance to the Board of Regents in fulfilling its fiduciary responsibilities for overseeing adequacy of and compliance with internal controls," "recommend[ing] to the [USM] Board the selection and scope of work of the independent external auditor of the University System of Maryland," and "review[ing] and recommend[ing] to the [USM] Board the scope of the internal audit function."

The Organization Committee's duties are set by the bylaws in seven sections. The first two sections provide:

- A. The Committee shall consider and report to the Board on all matters requiring the attention of the Board concerning the organization and structure of the University System of Maryland, its constituent institutions and centers, and the System

Office. The Committee shall also consider and recommend to the Board on all matters pertaining to the performance and compensation of the Chief Executive Officers of the System.

- B. The Committee shall have the responsibility from time to time for conducting strategic reassessments of the organizational structure and leadership resources of the System and its institutions and centers, reporting on these to the Board, and forwarding recommendations for changes as needed or desired. The Committee shall also consider any recommendations for major organizational changes which are forwarded by the Chancellor for the Board's consideration.

The bylaws also assign duties to the Development Committee. Among other things, that committee “shall consider and report to the [USM] Board how the University System of Maryland can best utilize its resources to promote the economic development of the State,” “develop strategies and recommend policies to the [USM] Board to strengthen links between the System and business, government, and communities, ” and “consider issues, resources, and policies related to economic development, including . . . research, technology transfer, workforce development, and accountability.”

Discussion

The Open Meetings Act, SG § 10-501 *et seq.*, applies to any meeting of a quorum of a public body that is convened to transact certain kinds of public business. For any meeting subject to the Act, a public body must comply with the Act’s notice, open session, and minute requirements. SG §§ 10-505 through 10-509. After holding a public vote to close a meeting, the public body may do so, but only to discuss matters within one of the Act’s specific, enumerated exceptions. SG § 10-508(d), (a) (1)-(14); *see also WSG Holdings, LLC v. Bowie*, 429 Md. 598, 631-32 (2013) (McDonald, J., concurring) (summarizing the Act). The members of the public body must then confine the closed-session discussion to the exception on which they relied in voting to close the session. SG § 10-508(b). When deciding whether discussion of a particular matter in closed session is permitted, a public body must strictly construe the enumerated exceptions in favor of open meetings. SG §10-508(c).

As relevant here, the Act does not apply to a meeting that a public body holds to perform an administrative, judicial, or quasi-judicial function. SG § 10-503(a)(1). Discussions that represent an “administrative function” are not generally subject to the requirements of the Act.

Complainant alleges that the USM Board violated the provisions of the Act that pertain to notice, minutes, closed-session procedures, and the administrative function exclusion.

A. Notice of “closed and executive” meetings

Complainant cites examples of committee meetings that the committees posted as “closed and executive sessions” without specifying the time or precise meeting location. To close a meeting subject to the Act, the public body must first convene in open session and vote to close the session, and the presiding officer must make or ratify a written statement of the statutory basis and reasons for closing and the topics to be discussed. SG § 10-508 (d); *see also* 8 *OMCB Opinions* at 144. A notice that excludes the public from the open session violates the Act, as does a notice that does not specify the time and place of the meeting. SG § 10-506(b). The violation is not merely technical; when a public body meets to perform a function covered by the Act, the public is to be given the opportunity to observe the vote and to be informed of why the meeting will be closed.³ It appears that all of the Organization Committee’s 2012 meetings were posted as closed. *See* <http://www.usmd.edu/regents/meetings/>.

B. Timely Approval of Minutes

As we recently explained to the USM Board in 8 *OMCB Opinions* at 180, the Act requires that minutes for both open and closed meetings be approved “as soon as practicable” after a meeting is held. Our review revealed a wide variation in approval times among committees. Often,

³ Complainant infers from various communications that notice was sometimes provided to select members of the media and not to the public generally. We would have treated this allegation as hypothetical but for the USM Board’s legal argument that SG § 10-506 lists “delivery” to the press as an acceptable method of giving notice. The Act does permit that method – if it constitutes “reasonable advance notice.” When a public body customarily uses a particular method of giving notice (here, the USM Board’s website), a sudden and unannounced abandonment of that method for a particular meeting is likely not “reasonable” under ordinary circumstances. And, we have advised that, when the “notice” given to the media is not in the form of a paid advertisement, “a public body should ordinarily not use delivery of notice to the news media as its sole means of giving public notice.” 6 *OMCB Opinions* 32, 33 n. 3 (2008). In sum: the submissions do not establish a violation, and the response over-generalizes.

approval of minutes would occur only a few weeks, or even days, after a public meeting. In some instances, however, approval was delayed for months. For example, despite intervening meetings of the full USM Board, the May 4, 2011, minutes of the Advancement Committee were not approved until November 2, 2011, and the minutes from November 2 were not “reviewed” until February 2, 2012.⁴ The USM Board offers no argument on what is “practicable.” Generally, delays of this magnitude violate the Act. *See id.* and opinions cited therein.

C. Closing Practices

Complainant complains of four practices followed by the regents with regard to closed meetings: first, the lack of written closing statements for many meetings; second, inadequate descriptions of the “reasons for closing” on some closing statements; third, the use of pre-prepared closing statements; and, fourth, the citation of multiple closed meeting exceptions as grounds for excluding the public.

As to the first two practices, the USM Board concedes that closing statements for a small number of closed sessions were not prepared and that others contain inadequate descriptions of the reasons for closing. These are violations of the Act, which the USM Board now understands and is working to correct. The failure to disclose the events of a session closed to perform a function subject to the Act deprives the public of information to which the public is entitled.

As to the third practice, we have already addressed one USM standing committee’s use of pre-prepared closing statements contained in meeting agendas. 8 *OMCB Opinions* at 168. We found the practice acceptable so long as the members adopt the agenda as the written statement when they vote to close the meeting. We direct the presiding officers of the other committees to the guidance we gave there.

As to the fourth practice, we generally note that a public body may close a meeting to discuss several topics—*if* each topic falls within an exception and *if* each is clearly traceable to the relevant statutory exception and reason for closing. The USM Board and its committees did not invariably meet those conditions in 2012. By way of illustration, the USM Board apparently cited seven exceptions and “administrative matters” as authority for its April 13, 2012 meeting and then gave some reasons that did not appear to fall within any of those cited. For example, the discussion

⁴ “Review of minutes” was listed as a February 1, 2012 agenda item for the Advancement Committee, though it does not appear that the minutes were approved at that meeting.

of “[a] contract for UMCP” does not correspond to any of the specific exceptions. Similarly, “[i]nstitutional real property transactions” does not establish that the discussion pertained to the “acquisition of real property for a public purpose,” as required by the exception that the USM Board appeared to invoke. SG § 10-508(a)(3)⁵ If the USM Board closed the meeting to discuss the de-acquisition of real property, it violated the Act by exceeding the scope of the statutory authorization it cited. *See, e.g., 6 OMCB Opinions* 35, 39 (2008) (explaining that the exception does not authorize closing a meeting to discuss the transfer of real property). The Finance Committee closed its June 19, 2012 meeting under the same exception but listed as topics the relocation of a program—not real property—and approval of a computer hardware contract. Closing a meeting for a reason not provided in the Act violates the Act.

In sum: we encourage the USM Board in its endeavor to change its practices. At the same time, compliance with the disclosure provisions applicable to closed sessions should not be viewed merely as “procedural enhancements”—the USM Board’s phrase—but as substantive measures that serve the statutory goal that “public business be performed in an open and public manner.” *See* SG § 10-501(a).

D. Open Session Requirement

The main thrust of the complaint is the allegation that the USM Board and its standing committees regularly misuse the Act’s “administrative function” exclusion to deliberate privately on matters that should be discussed in open session. The USM Board’s response to the complaint omits the pertinent facts on the functions assigned to the committees by the USM Board’s bylaws, does not apply the statutory test for the exclusion to the events of the many meetings for which the USM Board and its committees claimed the exclusion, and leaves unclear the intent of the Organization and Audit committees to revisit their application of the administrative function exclusion. We will explain the two-part test. We urge the USM Board and its committees to apply it. We will then address the USM Board’s assertion that its discussion of budget concerns need not be in open session so long as it votes in open session.

1. Administrative function exclusion – the two-part test

As relevant here, for a discussion to constitute the public body’s exercise of an “administrative function” under SG § 10-502(b), the discussion must satisfy a two-part test. *5 OMCB Opinions* 42, 44 (2006).

⁵ The USM Board’s response does not dispute Complainant’s quotations from its documents, and we have therefore deemed those quotations to be accurate.

First, the discussion must not fall within one of the five functions excluded from the definition by SG § 10-502(b)(2). If the discussion does fall within one of those functions, it is not “administrative” in nature, and the inquiry stops. *Id.* Second, the discussion must involve the administration of existing law. 5 *OMCB Opinions* 44. As we have said before, “discussions about prospective policies and recommendations of future actions on subjects of public concern very seldom, if ever, qualify for the administrative function exclusion.” 7 *OMCB Opinions* 250, 254 (2011).

We begin with the first part of the test: whether the discussion falls within any of the functions excluded from the definition of “administrative function.” The excluded functions include the “advisory function” and the “quasi-legislative” function. SG § 10-502(b)(2)(i),(v). Public bodies perform advisory functions when they “stud[y] a matter of public concern or mak[e] recommendations on the matter, under a delegation of responsibility by . . . formal action by or for a public body that exercises an administrative, judicial legislative, quasi-judicial, or quasi-legislative function.” SG § 10-502(c) (4). Public bodies perform the “quasi-legislative” function when they adopt rules and regulations, and when they engage in the “process or act of . . . approving, disapproving, or amending a budget” or of “approving, disapproving, or amending a contract.” SG § 10-502(j).

The USM Board’s committees thus are *not* performing an administrative function when, under a delegation by the USM Board, they are studying matters of public concern in order to make recommendations to the USM Board. Specifically, the Organization Committee, when “conducting strategic reassessments of the organizational structure and leadership resources of the System and its institutions and centers, reporting on these to the USM Board, and forwarding recommendations for changes as needed or desired,” performs an advisory function subject to the Act. It may be that the Committee’s “strategic reassessments” include discussions about individual employees or implicate information about ongoing collective bargaining negotiations, and that the committee could close a meeting under the statutory exceptions applicable to such discussions. Those meetings, however, would be subject to the Act and the closed-session procedures, not excluded from the Act under a claim that they entail administrative functions. The Organization Committee met exclusively in closed sessions in 2012.⁶

⁶ The USM board states that the Organization Committee “primarily [carries] out, or deal[s] with matters related to, . . . the administration of personnel matters such as remuneration, employee benefits, organizational structure and the like; [it does] not transact public business. These are administrative tasks to which the Act does not apply.” The USM Board misunderstands the Act. First, a public body that claims that a task lies within its own administrative function is clearly performing “public business.” Next, the discussion of “organizational structure”

As to the Audit Committee, the USM Board was advised by counsel in January 2010 that the Audit Committee could generally conduct its meetings in closed session because its activities fell within the “administrative function” exemption. This may be true of much of the business conducted by the Audit Committee, which also met exclusively in closed sessions in 2012. However, when performing its assigned duty to “recommend to the [USM] Board the selection and scope of work of the independent external auditor,” the Audit Committee is likely performing an advisory function, and, if its work is part of the process of approving a contract, the quasi-legislative function.⁷ One of the fourteen exceptions might apply—among them, an exception for certain procurement matters and one that incorporates the mandatory confidentiality provisions of the Public Information Act—but the committee needs to examine the task at hand to determine whether an exception applies and, if any exception applies, follow the closing procedures set forth in SG § 10-508(d).

The Development Committee, when considering matters so that it can “recommend policies to the [USM] Board” is similarly performing an advisory function, not an administrative function. On September 13, 2012, that committee closed a meeting to discuss “administrative matters” and discussed topics such as “creating an investment fund that would enable alumni to invest in university startups” and “intellectual property policies at Pennsylvania State University and the University of Minnesota that provide incentives and ease barriers for industry-sponsored research.” Those discussions were very likely advisory in nature, and the committee likely violated the Act by excluding the public.

The second part of the two-part “administrative function” test requires that the task involve the administration of existing law. 5 *OMCB Opinions* at 44. That element has two sub-elements: “there [must be] an identifiable prior law to be administered, and the public body holding the meeting must be vested with legal responsibility for its administration.” *Id.*; see also 7 *OMCB Opinions* 131, 135 (2011). By way of illustration, this part of the test is met when a public body elects its own officers, see,

– an abstract term we take to relate to personnel system issues—implicates policy, not the administration of personnel policies to particular employees’ situations. See 3 *OMCB Opinions* 182, 184-85 (2002) (discussion about composition of management board was not “administrative”). And, such a discussion would not qualify for the “personnel matters” exception set forth in SG § 10-508(a)(1), even had the committee properly invoked it before closing the session, because that exception protects individual employee information, not discussions about classes of employees. 6 *OMCB Opinions* 180 (2009).

⁷ According to the Audit Committee’s draft minutes of that meeting, counsel also advised the committee that “there may be instances where the Audit Committee may not be exempt.” We agree.

e.g., 7 *OMCB Opinions* at 101, or applies set standards to a set of facts, as when a medical review panel applies regulations to the cases before it, but not when the same review panel discusses what the standards should be. 7 *OMCB Opinions* at 254. Although the Audit Committee's application of already-adopted accounting standards and policies to a set of facts might qualify as an administrative function if the committee has been charged with administering those standards and policies, see 6 *OMCB Opinions* 23, 24-27 (2008), the various committees' discussions of what policies, contracts, and budgets to recommend to the USM Board do not meet this part of the test. Many of the duties that are assigned to the committees in the bylaws do not involve "administration."

The USM Board's own "executive sessions"⁸ also likely do not meet the second part of the test. For example, the "notes" of the USM Board's November 2, 2012 closed meeting state: "The regents met with President Gibraltar and President Boesch to discuss institutional strategic, budgetary and administrative matters." A discussion of "strategic" matters does not fall within the administrative exclusion, and we find that the USM Board violated the Act by excluding the public from that part of the discussion. We do not have enough information about the "budgetary" and "administrative" matters discussed that day to reach a determination. The "notes" for "executive sessions" held by the USM Board on other dates refer variously to matters such as approvals of memoranda of understanding, discussions about tuition rates, sales of equipment, and naming rights. It seems unlikely that the USM Board reached its decisions in all of these matters merely by applying previously-adopted standards to the pertinent facts. While some of these discussions might have fallen within a statutory exception, the meeting notes do not reflect a vote, in an open meeting, on a motion to close on that basis.

From the USM Board's response and the documents available to us, it appears that the USM Board and its committees, particularly the Organization and Audit Committees, have not been applying the first part

⁸ The USM Board's terminology does not appear in the Act, which refers instead to "closed" meetings. Further, the Act now uses the term "administrative function" in lieu of "executive function." We recommended that change to avoid confusion between "executive session" and "executive function." Open Meetings Compliance Board, *Use of the Executive Function Exclusion Under the State Open Meetings Act* 19-20 (December 2005). We suggest that public bodies use the current terminology: "closed" meeting and "administrative" session. A reference to a "closed" session on an agenda may serve to prompt the presiding officer to follow the closed-session procedures, while a reference to an "executive session" may give that officer the wrong impression that the function to be performed is "executive" in the sense of "administrative," and thus outside of the Act.

of the administrative function test at all and have been mistaking the scope of the second part of the test. Given the substantial advisory roles that the bylaws assign to the committees and the policy-making functions assigned to the USM Board itself, the frequency and duration of the closed sessions give us pause: two committees held *no* open meetings but convened only in closed session to discuss administrative matters, and others closed substantial portions of numerous meetings. We stress that the administrative exclusion is not a shield for matters that do not fall within an exception but that the public body deems confidential. The Legislature, by setting the presumption that public bodies are to meet publicly unless the Act provides otherwise, SG § 10-505, and by enacting the fourteen exceptions, reserved for itself the decision of what subjects may be treated as confidential. The administrative function exclusion is not a vehicle by which a public body may make that determination.

In sum: before excluding the public from a meeting on the grounds that the discussion will fall within an administrative function, the USM Board and its committees should first apply the definitions of “advisory,” “quasi-legislative,” and the other three functions to each agenda item. If the tasks do not meet these definitions, the USM Board and its committees should proceed to the second part of the test. If the tasks do not meet both parts of the test, or if there is doubt, the USM Board and its committees should conduct the meeting under the Act and close it only in accordance with the Act’s procedures. And, as a practical matter, the members of a public body that holds its “administrative” meetings publicly have the leeway to discuss related policy matters without having to postpone that part of the discussion until proper notice can be given.

2. The USM Board’s assertions that a meeting on budgetary matters may be closed unless the Act prohibits the closure and that only the action on a budget must be taken in open session

The USM Board offers two broad propositions that reflect a fundamental misunderstanding of the Act.⁹ First, the USM Board argues: “[t]here is no prohibition in the Act against deliberating in closed session whether a budget should be approved, disapproved or amended, so long as any vote to approve, disapprove or amend the budget is public.” The initial assumption embedded in that sentence—that the USM Board may close a meeting unless the Act contains a “prohibition” against it—is fundamentally incorrect. The Act requires:

⁹ The USM Board’s response includes the information that outside counsel were “engaged at the request of the Chancellor and Chair of the Board of Regents to provide them with independent advice and counsel with respect to this matter” and that the outside counsel provided “substantial assistance” on the response. Either way, we attribute to the public body the statements made on its behalf in a response to a complaint.

Except as otherwise expressly provided in this [Act], a public body shall meet in open session.

SG § 10-505. That provision implements the “public policy of the State” that, “[e]xcept in special and appropriate circumstances when meetings of public bodies may be closed under this [Act], . . . the public be provided with adequate notice of the time and location of meetings, which shall be held in places reasonably accessible to individuals who would like to attend” SG § 10-501(c); *see also Community and Labor United for Baltimore Charter Committee v. Board of Elections* [“C.L.U.B.”], 377 Md. 183, 187 (2003). The USM Board thus has it precisely backwards: the question is not whether the Act prohibits a closed session, but rather whether the Act expressly allows it.

The second assumption embedded in that sentence—that deliberations on a budget may be secret so long as the action on it is taken in public—appears again in the USM Board’s next sentence. There, the USM Board asserts: “Privately discussing such matters and the implicated budgetary concerns is appropriate under the Act, so long as the [USM] Board takes action on any resulting need to amend, approve or disapprove of a budget in public.” The USM Board offers neither facts nor law to support its invocation of the administrative function exclusion to hold such discussions “privately,” so we address the issue in the abstract.

In the abstract, the quasi-legislative function includes, (and thus the administrative function excludes), the “*process or act* of . . . approving, disapproving, or amending a budget.” SG § 10-502(j)(2) (emphasis added). The “*act*” is the vote. As the Court of Appeals has frequently explained, the “*process*” includes every stage of the deliberations on the matter:

It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business.

C.L.U.B., 377 Md. at 193 (internal quotation marks omitted) (quoting *New Carrollton v. Rogers*, 287 Md. 56, 72 (1980)). In asserting that the USM Board need only vote on budget matters in public, the USM Board overlooks the word “process.” The USM Board also overlooks the purpose of the Act, as repeatedly explained by the Court of Appeals, to “prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance.” *J.P. Delphey Limited P’shp v. Mayor and City of Frederick*, 396 Md. 180, 201 (2006) (internal quotation marks and citations omitted). The USM Board’s broad assertion that the deliberation

on a budget may be held in secret so long as the vote is public has no legal basis.

The USM Board suggests that there might be situations in which a public body could close a meeting under one of the SG § 10-508 exceptions, such as those pertaining to the acquisition of real property or individual personnel matters. The complaint here, though, is that the meetings were held under the administrative function exclusion, without notice and a public vote to close under a particular exception. We note that the initial preparation of a budget document might fall within a governing body's administrative function, especially when the governing laws assign the task to the public body and then provide for publication of the document and a deliberative phase. *See Board of Commissioners of Carroll County v. Landmark Community Newspapers*, 293 Md. 595, 605-07 (1982) (stating, but not adopting, the commissioners' argument that the initial preparation of a draft budget items fell within their "executive" function; deciding the case on other grounds); *see also* 4 *OMCB Opinions* 28, 33 (2004) (discussing the distinction between preparation and consideration of a budget as a legislative process); 3 *OMCB Opinions* 39 (2000) (same). As much depends on the public body's statutory role in the budget process, *see id.*, generalizations are seldom appropriate. The USM Board's response does not include an application of the two-part administrative function test to the topics discussed in the closed meetings.

In sum: to comply with the Act, the USM Board must identify the nature of its budget discussions and its statutory role in the process, apply the two-part test for the administrative function exclusion, and close the meeting only if there is an express provision in the Act that supports that action. We emphasize: except as expressly provided in the Act, all meetings of public bodies subject to the Act are to be open, and the process by which the public body reaches a decision, as well as its vote, is to be conducted openly.

Conclusion

In this opinion, we have given guidance on how the USM Board and its committees should approach the inquiry of whether they may close a meeting. Particularly, we have encouraged them to examine their apparently-routine invocation of the "administrative function" exclusion from the Act. In many instances, the information available to us is insufficient to say whether a violation occurred. In others, however, the minutes reflect policy discussions that travelled well beyond the exclusion for mere "administrative matters." In those events, the USM Board and some of its committees violated the Act by meeting in "executive" session without observing the notice and closed-session procedures set forth in the Act.

We therefore urge the USM Board and its standing committees to thoroughly review how, and whether, the “administrative functions” exclusion applies to the actual functions performed by these committees. The USM Board and committees should do so with the understanding that the Act sets openness as a default, not as an exception.

Open Meetings Compliance Board

Elizabeth L. Nilson, Esquire

Courtney J. McKeldin

Julio A. Morales, Esquire